As appears from the learned Magistrate's Grounds of Decision, he was of the view that counsel agreed the appellants' father was a statutory tenant and confined himself to the question whether the children of a statutory tenant were entitled to the tenancy after his death. It is unarguable that a statutory tenant has a purely personal right. But was deceased a statutory tenant? This can be decided here even if counsel had made an erroneous admission. I would quote a passage from *Maharani Beni Pershad Koeri* v. *Dudh Nath Roy et al.*[1]: —

"In the opinion of their Lordships this admission, if correctly understood, was erroneous in point of law, and does not preclude the counsel for the appellant on this appeal from claiming his client's legal rights."

The learned judge on appeal from the Magistrate's decision said: —

"... I allowed Mr. Atma Singh to put in a certified copy of the judgment of the Rent Board Kuala Pilah dated December 19, 1947 (Exhibit'A'). The outcome of the failure of that ejectment proceedings was that the deceased became in effect a statutory tenant, though this term was not so called in the Rent and Charged Land (Restriction) Enactment, 1940, the law pertaining at that time."

We respectfully disagree. The Rent and Charged Land (Restriction) Enactment (No. 14 of 1940) has no definition of statutory tenant. Section 3 provides that "tenant" includes the widow of a tenant dying intestate who was residing with him at the time of his death. The relevant section under which the proceedings before the Rent Assessment Board Kuala Pilah was instituted is section 7. This reads: —

"7. No landlord shall without the permission of the Board in writing eject or apply to any court for an order for the ejectment of or take any step towards ejecting his tenant from any premises to which this Enactment applies: Provided that this section shall not apply to ejectment for non-payment of rent where rent at a lawful rate has been in arrear for fourteen days."

As the landlord's application was dismissed, the contractual tenancy continued undisturbed. Upon his death, the appellants both as legal personal representatives and as children residing with him at the time of his death are clearly in law entitled to tenancy of the premises.

We allow the appeal and quash the orders of the High Court and the Magistrate's Court including order for payment of costs by the appellant. We make no order for costs here as we think counsel for both sides must accept responsibility for the action coming as far as it has done.

Appeal allowed.

Solicitors: *Joseph & Son; Gill & Tang.*

YOONG HOCK PIN v. PUBLIC PROSECUTOR

[F.C. (Ali Ag. C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.JJ.) February 5, 1977]

[Kuala Lumpur — Federal Court Criminal Reference No. 2 of 1976]

Criminal Law and Procedure — Criminal breach of trust — Proof of entrustment of property to the accused — Duty of prosecution to prove its case — Appeal — Whether appellate court can alter charge.

Penal Code, s. 409 — Charge — Amendment at appellate stage.

In this case the appellant was charged with criminal breach of trust of a sum of $1,411.25 between May 1, 1972 and May 29, 1972. The learned President of the Sessions Court found as a fact that some money had been handed to the appellant which had not been accounted for. As he found that the appellant had failed to satisfy beyond merely denying that he had misappropriated the money, he convicted the appellant. On appeal, the learned judge found some doubt as to the actual sum handed over to the accused. He found however that the money received by the appellant amounted to $392.21 and he varied the conviction to one of criminal breach of trust of that sum. He then reserved certain questions for the decision of the Federal Court.

Held: (1) in a prosecution for a charge of criminal breach of trust of a specified sum of money, it is not sufficient for the trial judge to hold that some money had been handed to the accused in order to conclude that a *prima facie* case had been made out against him;

(2) it is not incumbent or necessary for the accused to offer an explanation when the prosecution has not in fact shown a *prima facie* case against him;

(3) it was not competent for the learned judge on appeal to amend the charge;

(4) in this case the court should go beyond answering the question of law posed and the conviction and sentence should be set aside.

Cases referred to:-

(1) *Quek Ching Kim* v. *Reg.* [1956] M.L.J. 54.

(2) *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.

FEDERAL COURT.

H. D'Cruz for the appellant.

Datuk Abdullah bin Ngah (Senior Federal Counsel) for the respondent.

Ali Ag. C.J. (Malaya) (delivering the judgment of the Court): This reference under section 66 of the Courts of the Judicature Act, 1964, from the High Court Malacca reserved the following questions of law of public interest for the decision of this court, namely: —

"1. In a prosecution for a charge under section 409 of the Penal Code whereby the accused is alleged to have committed criminal breach of trust of a specified sum of money, is it sufficient for the learned President to hold as a finding of fact that '... some money had been handed to the accused ...' in order to conclude that a *prima facie* case had been made out against him?

2. In a prosecution for a charge under section 409 of the Penal Code whereby the accused is alleged to have committed criminal breach of trust of a specified sum of money, is it incumbent upon the accused to provide an explanation when the actual sum in respect of which he is alleged to have committed criminal breach of trust has not been determined by evidence?

3. In a prosecution for a charge under section 409 of the Penal Code whereby the accused is alleged to have committed criminal breach of trust of a specified sum of money, is it necessary for the accused to offer an explanation as to what

happened to the sum in respect of which he is alleged to have committed criminal breach of trust, if the prosecution evidence

(a) has furnished sufficient explanation thereof, or

(b) has left a material gap by not calling the necessary evidence at its disposal?."

The appellant was charged in the first instance with criminal breach of trust of a sum of $1,411.25 between May 1, 1972 and May 29, 1972. The case for the prosecution rested on the evidence of the following witnesses: —

1. Inspector Nelson Das, an A/O.C.P.D. who said:
   (a) for March — for water $846.40 and electricity $558.45 — total $1,404.85.
   (b) Sgt. Annuar informed me that normal procedure ... he always hands money to Inche Siew Yen Poon. He never handed cash to Mr. Yoong.
   (c) On 1st May ... accused again approached me to contact Sgt. Annuar to hand over the money. I have no record how much money I gave to Sgt. Annuar.
   (d) As all the money given to Sgt. I would not know what happen to money.
   (e) I left everything to O.C.P.D. I never ask Siew about money. I did not find out when money handed over to C.C.
2. PW8 testified ... he handed the money amounting to $1,411.25 for water and electricity to the accused.
3. PW4 the Financial Assistant ... testified the total amount of $852.50 for water and $558.45 for electricity were not credited.

The learned President with two conflicting versions without any evidence — which should be a simple matter for the prosecution to adduce as to the duties of the applicant, the mode of entrustment and the actual amount entrusted — "found as a fact that *some* money had been handed to the accused which he had not accounted for. PW8 did not seem very sure as to the exact amount ... that was handed to the accused."

He then went on to say:

"The defendant admitted receiving $460.59 only from Sgt. Annuar in respect of payment of water. He denied receiving amount as stated in the charge. He testified he received the money on the 29th of April 1972 and had credited the amount into the bank. ... In re-examination he admitted receiving $852.80 and the money had been credited into the bank. ... *The defendant in effect admitted receiving some money but he had not informed the court what had happened to the money otherwise than saying that the money had been credited.* (Italics are mine). The prosecution had given evidence that no such amount was ever credited."

It seems to us the learned President erred in the matter of the onus of proof. As posed in the later two questions, the guilt was determined by the failure of the appellant to satisfy the court beyond merely denying he had misappropriated the money. Here we quote a passage from *Ratanlal* The Law of Crimes, 22nd Edition, at page 1051: —

"Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, ..."

The matter was taken on appeal to the High Court. There again, the court was troubled by the divergent versions and doubt as to what was received by the applicant, and was not prepared to agree with the learned President's findings of fact which took into account hearsay and inadmissible evidence. The learned judge found "some doubt as to the actual sum handed over to the accused on May 1, 1972." He found, however, that money received on May 1, 1972 from PW8 amounting to $392.21 had not been banked and varied the conviction to one of criminal breach of trust of that sum instead of the sum of $1,404.85.

We do not think that it was competent for the learned judge on appeal to amend a charge and refer to the case of *Quek Ching Kim* v. *Reg.*[1]

We examined section 409 of the Penal Code which we now set out: —

"Whoever, being in any manner entrusted with property, or with any dominion *over property*, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust *in respect of that property*, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to a fine."

(Italics are mine).

In our view, no question of construction is really involved and the answer to the first question must therefore be in the negative. We think that the matter goes further in that adopting the position taken by the learned President would result in the reversal of the undoubted rule that it is always for the prosecution to prove its case. The answers to the two last questions are therefore also in the negative.

In this reference we examined the exhibits in the courts below. We find exhibit P6 (a prosecution exhibit) corroborates in full the defence testimony. These entries appear at p. 283789, a receipt No. 852684 dated May 1, 1972 for $392.21 (the amount admitted) and two other sums bearing receipt No. 852685 for $16.50 and receipt No. 600262 for $2 totalling $410.71. There is Malayan Banking Bhd. confirmation of receipt of this sum on May 1, 1972. It is significant that on May 12, 1972 a Federal Treasury Police Auditor endorsed the correctness of the entries in P6 at p. 283791 and the Financial Assistant PW4 on May 29, 1972 also endorsed the entries on May 29, 1972 at p. 293793.

Having also closely scrutinised the evidence, we are of the view, following *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor*,[2] that we should go beyond merely answering the questions of law posed. To that end, we have set out what seem to be relevant material for our decision. Learned Senior Federal Counsel conceded that the conviction and sentence could not be maintained and we accordingly set aside the conviction, sentence and fine.

Order accordingly.

Solicitors: *Tay Leong Siak & Co.*